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July 15, 2021

Smith et al. v. Annucci et al.  
1:21-cv-01715-RA [rel. 1:17-cv-07954-RA-OTW]

Dear Magistrate Judge Wang:

We submit this joint status letter in accordance with this Court's Order dated June 25, 2021, to report the following updates in the above-captioned case:

**Amended Complaint.** On May 19, 2021, counsel for Plaintiff Jane Smith notified the DOCCS Deputy Commissioner and Counsel, Associate Commissioner in the Office of Sexual Abuse Prevention and Education and Deputy Chief of the Sex Crimes Division of the Office for Special Investigations ("OSI") about a sexual assault of another inmate in DOCCS custody, "Mary Doe", by one of the Defendants in 2019 while she was housed at the Bedford Hills Correctional Facility. OSI investigators interviewed Ms. Doe with her counsel present on June 24, 2021.

Following the OSI interview, Ms. Doe moved on July 9, 2021, to proceed anonymously as a newly joined Plaintiff in this action. (Dkt. 82.) That motion was granted earlier today. (Dkt. 84.) A redacted version of the Amended Complaint was submitted as Exhibit C to that motion (Dkt. 82-3), and has since been filed as its own entry on the case docket (Dkt. 85). Plaintiffs have also requested permission for the Clerk to issue a supplemental summons under seal for the newly joined anonymous Defendant, "Officer E". (Dkt. 86.)

**Discovery.** Counsel for Plaintiffs anticipates serving its first set of discovery requests on Defendants within the next seven to ten days. The parties are currently in the process of negotiating a stipulated protective order governing confidential discovery materials, which we will submit to this Court for approval. As noted in the parties' letter submitted on May 27, 2021, the parties anticipate that a dispute may arise regarding the scope of Plaintiffs' discovery requests. The parties' respective positions

are briefly previewed below, and should their dispute remain unresolved following service of Plaintiffs' discovery requests, the parties will promptly submit the dispute to Your Honor for resolution.

Plaintiffs' position: It is Plaintiffs' position that discovery beyond "items of a general nature" should commence as to the supervisory Defendants now represented by the New York State Attorney General's Office ("OAG") and should not be stayed in anticipation of or pending any possible motion to dismiss. In particular, Plaintiffs are entitled to responsive, non-privileged documents within the custody or control of the represented supervisory Defendants and their offices. This may include documents related to disciplinary records, assignments, log books and facility maps and plans.

Defendants' position: Defendants' position is that in light of the fact both, that it anticipates making a motion to dismiss certain of the defendants, and that it currently does not represent the majority of the defendants because it has not completed its representational analysis, at this stage it should only be required to engage in discovery of a general nature, such as that involving the production of directives, policies and procedures.

**OSI Investigation & OAG Representational Analysis.** Finally, the parties respectfully submit the following positions regarding OSI's ongoing investigation into Plaintiffs' allegations and OAG's representational analysis.

Plaintiffs' position: Plaintiffs' counsel understands that OSI has not yet completed its investigation into Ms. Smith's allegations and that OAG has therefore not yet fully completed its representational analysis under Public Officers Law § 17 for any Defendant implicated by Ms. Smith's allegations other than Messrs. Annucci, Effman, Maher, Nunez and Shipley. Given that (i) Plaintiff Smith initiated this lawsuit nearly five months ago, (ii) a full investigation should have been performed in 2019 at the time Plaintiff Smith first made her allegations, (iii) OSI indicated in April 2021 that its investigation into Ms. Smith's claims would take approximately three months (as conveyed to Plaintiffs' counsel by Mr. Shevlin on April 29, 2021) and (iv) OSI represented to Mr. Shevlin that it anticipates its investigation of Plaintiff Doe's allegations will be complete by the end of this summer, Plaintiffs respectfully request an Order directing OSI to complete its investigation into Plaintiffs' claims and OAG to complete its representational analysis by August 16, 2021. Such an Order will provide clarity regarding Defendants' representation in this case and may help resolve or narrow the scope of the parties' dispute regarding the level and nature of discovery that should proceed in anticipation of or pending any motion to dismiss.

Defendants' position: Defendants respectfully request that the Court not impose a deadline by which OSI must complete its investigations into the allegations of the two plaintiffs and OAG must conclude its representational analysis. This week, counsel for the supervisory Defendants was advised by OSI that it anticipates that its investigations into the allegations raised by both plaintiffs in this case (claims that overlap) will not conclude before the end of the summer. This is the case because OSI has limited staff and multiple investigations it is conducting at the same time. Only after

OSI has completed its investigations can OAG undertake its representational analysis. In light of the foregoing, and as an alternative to plaintiffs' untenable request that the Court set August 16 as the date by which OSI must conclude its investigations and the OAG must conclude its representational analysis, OAG proposes that it be required to issue to the Court by August 30, 2021, a status report as to OSI's investigations. By that time, OSI should have completed its investigations or be close to doing so.

Respectfully,

/s/ David M. Stuart

David M. Stuart  
Attorney for Plaintiffs

/s/ Neil Shevlin

Assistant Attorney General Neil Shevlin  
Attorney for Defendants

The Honorable Ona T. Wang  
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VIA CM/ECF